

S.E.2d 761 (1963). The plaintiff must both allege and prove that he has the capacity to sue. *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E.2d 183 (1951). Moreover, the action must be instituted by the personal representative within two years after the death of the decedent. N.C.Gen.Stat. § 1-53(4) (1983).

Westinghouse v. Hair, 107 N.C.App. 106, 107 (1992). While this action was brought within two years of the death of plaintiff's granddaughter, it was not brought within two years by a person having standing to bring the action as plaintiff does not allege that she was qualified and appointed as the administratrix of her granddaughter's estate. North Carolina law provides for a savings provision that would allow the administratrix of an estate to ratify a previously but improperly filed action on behalf of the estate. Estate of Tallman ex rel. Tallman v. City of Gastonia, 200 N.C.App. 13, 22-23 (2009).

Rather than dismiss the action, the court provided plaintiff with an opportunity to qualify as the administratrix and retain counsel. On the last day of the period, plaintiff filed a request for additional time, which was allowed upon representation that she had engaged counsel to commence probate. At the end of such extension, plaintiff now requests a voluntary dismissal without prejudice stating that she has not been able to retain counsel and asking that the dismissal be without prejudice "to re-commence the action is Counsel if ever retained." Motion for Voluntary Dismissal (#24), at ¶ 3.

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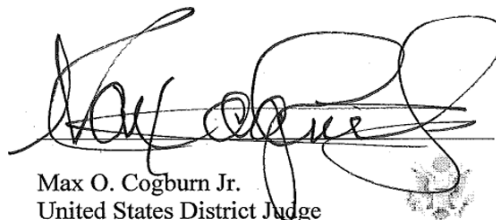
While the court will dismiss the action without prejudice as plaintiff lacks standing as a matter of law to bring the claim, plaintiff is advised that such claim can only be brought by the administrator of decedent's estate by counsel and that in terminating this action, it is probable that the savings provision of Estate of Tallman ex rel. Tallman would no longer apply as there would be no pending action for the administrator to ratify.

ORDER

IT IS, THEREFORE, ORDERED that

1. plaintiff's Motion for Voluntary Dismissal Without Prejudice (#24) is **ALLOWED**, and this action is dismissed in accordance with Rule 12(b)(1) and Rule 41 without prejudice.

Signed: June 7, 2012



Max O. Cogburn Jr.
United States District Judge